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DIGEST OF RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

SHIVELEY'S ADM'R *v.* NORFOLK & W. RY. CO.

June 12, 1919.

[99 S. E. 650.]

1. Appeal and Error (§ 839 (1)*)—Review in Case of More than One Trial.—Where errors assigned are the setting aside of a judgment for plaintiff at the first trial and entering a judgment for defendant at the second trial, the court on appeal will, under Code 1904, § 3484, look to the record of the first trial, and, if there was error, in setting aside the verdict, enter judgment on such verdict.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 578.]

2. Appeal and Error (§ 839 (1)*)—Review—Setting Aside Verdict.—On appeal from a decision setting aside a verdict at the first trial and entering a judgment for defendant on the second trial, all evidence on the first trial will be considered and the verdict sustained, unless against the law and the evidence or without evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 579.]

3. Railroads (§ 369 (3)*)—Licensees—Persons on Track—Care Required.—A railroad company owes no duty of prevision to licensees, but must, under the circumstances existing at the time, use reasonable care to discover and avoid injuring persons reasonably expected to be on the track at a certain point.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 582.]

4. Railroads (§ 312 (8)*)—Statutory Regulations—Crossing Highways.—Code 1904, § 1294d, subd. 24, requiring crossing signals to be sounded, is not limited in its application to travelers along the highway intending to cross the railroad tracks at the crossing, but also applies to one who has reached the highway crossing by traveling along the track.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

5. Statutes (§ 226*)—Construction—Intention of Legislature—Presumption.—Where similar statutes existed in other states before a certain statute was adopted in Virginia, the Legislature will be presumed to have adopted the same construction which such a statute had previously received in the courts of such other states.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 769.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Railroads (§ 348 (2)*)—Death at Crossing—Action—Evidence—Place of Accident and Cause of Death—Sufficiency.—In action for death at railroad crossing, evidence held sufficient to sustain the jury's finding that decedent was killed at such crossing, and that the accident was due to the negligence of the company in running its train over a crossing frequently used by pedestrians, at high speed on a dark night, without proper lights and without sounding the crossing signals, required by Code 1904, § 1294d, subd. 24.

7. Railroads (§ 312 (3)*)—Statutes—Crossing at Highway—Signals—Purpose—Mandatory Effect.—Code 1904, § 1294d, subd. 24, requiring sounding of signals at railroad crossings, was intended to prevent accident and is mandatory, the company being liable if violation thereof is the proximate cause of the injury or death of one not guilty of contributory negligence.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 132; 17 Va.-W. Va. Enc. Dig. 249.]

8. Railroads (§ 351 (9)*)—Death at Crossing—Action—Requested Instruction—Statutory Requirements.—In action for death at railroad crossing, instructions which ignore or controvert the imperative mandate of Code 1904, § 1294d, subd. 24, requiring crossing signals, held properly refused.

9. Trial (§ 253 (7)*)—Death at Crossing—Instructions—Ignoring Evidence.—In action for death at railroad crossing, instructions which directed verdict for defendant upon a partial view of the evidence held properly refused.

[Ed. Note.—For other cases, see 14 Va.-W. Va. Enc. Dig. 300.]

10. Railroads (§ 350 (13)*)—Death at Crossing—Question for Jury—Contributory Negligence.—In action for death at a railroad crossing, habitually used by pedestrians, defendant's train, running at high speed on a dark night, without lights and signals required by Code 1904, § 1294d, subd. 24, whether deceased was guilty of contributory negligence, held, under the facts, a question for the jury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 143; 14 Va.-W. Va. Enc. Dig. 300; 17 Va.-W. Va. Enc. Dig. 255.]

11. Railroads (§ 312 (8)*)—Accident at Crossing—Signals at Crossing—Duty to Give—Who Entitled to.—A traveler on a railroad, where it crosses a highway, is entitled to be warned of an approaching train by the crossing signals prescribed by Code 1904, § 1294d, subd. 24, and if killed through no contributory negligence on his part, but through the failure of defendant to sound the proper signals required, he can recover, although there were double tracks and another train passing at the time.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 132.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Appomattox County.

Action by the administrator of the estate of W. H. Shiveley, deceased, against the Norfolk & Western Railway Company. From a verdict and judgment for defendant upon a second trial granted after sustaining a motion to set aside a verdict for plaintiff in the first trial, plaintiff brings error. Reversed.

S. L. Ferguson, of Appomattox, *F. C. Moon*, of Lynchburg, and *W. C. Franklin*, of Tulsa, Okl., for plaintiff in error.

F. S. Kirkpatrick, of Lynchburg, and *W. H. Mann*, of Petersburg, for defendant in error.

TRAUERMAN *v.* OLIVER'S ADM'R.

June 12, 1919.

[99 S. E. 647.]

1. Municipal Corporations (§ 706 (8)*)—Automobile Accident—Instruction—Burden of Proof.—In action against automobile driver for death of plaintiff's intestate while standing upon sidewalk, where court charged jury that plaintiff had burden of proving allegations of declaration, plaintiff held entitled, under the evidence, to instruction that, if automobile struck deceased while standing upon sidewalk, defendant driver had burden of showing that she was not negligent.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 256.]

2. Municipal Corporations (§ 706 (8)*)—Use of Streets—Automobile Accident—Instruction.—In action for death of plaintiff's intestate from automobile accident while standing upon sidewalk, requested instruction that, if deceased was struck while on sidewalk, defendant driver had burden of showing "by a preponderance of evidence that said killing was unavoidable," did not, by use of word "unavoidable," throw too great burden on defendant; it being apparent that only proof required was that she had done everything a reasonably prudent person would have done to avoid the injury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 256.]

3. Municipal Corporations (§ 706 (3)*)—Automobile Accident—Death of Man upon Sidewalk—Burden of Proof.—Automobile driver, being sued for death of person struck by automobile while standing upon sidewalk, had burden of proving that she did everything an ordinarily reasonably prudent person would have done to avoid the injury.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 170.]

4. New Trial (§ 39*)—Grounds—Refusal to Give Instruction.—In action for death of plaintiff's intestate from being struck by au-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.